91-1900

No.

Supreme Court, U.S.
FILED
FEB 10 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

ANDREW LEVCHUK
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Constitution prohibits a court from enhancing a defendant's sentence under Sentencing Guidelines § 3C1.1 if the court finds that the defendant committed perjury while testifying at trial.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Sentencing Guideline involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	17
Appendix A	1a
Appendix B	16a
Appendix C	29a
Appendix D	30a

TABLE OF AUTHORITIES

Cases:

Braxton v. *United States*, 111 S. Ct. 1854 (1991)	7
United States v. *Acosta-Cazares*, 878 F.2d 945 (6th Cir.), cert. denied, 493 U.S. 899 (1989)	9
United States v. *Akitoye*, 923 F.2d 221 (1st Cir. 1991)	9
United States v. *Barbosa*, 906 F.2d 1366 (9th Cir.), cert. denied, 111 S. Ct. 394 (1990)	9
United States v. *Bautista-Polanco*, 927 F.2d 14 (1st Cir. 1991)	9
United States v. *Beaulieu*, 900 F.2d 1537 (10th Cir.), cert. denied, 110 S. Ct. 3252 (1990)	9
United States v. *Contreras*, 937 F.2d 1191 (7th Cir. 1991)	9, 13
United States v. *Craigo*, No. 90-5351 (4th Cir. Feb. 3, 1992)	10
United States v. *Grayson*, 438 U.S. 41 (1978)	5, 6, 8, 11, 12
United States v. *Jones*, Nos. 90-3498 *et al.* (7th Cir. Dec. 19, 1991)	9
United States v. *Keys*, 899 F.2d 938 (10th Cir.), cert. denied, 111 S. Ct. 160 (1990)	9
United States v. *Lozoya-Morales*, 931 F.2d 1216 (7th Cir. 1991)	15

Cases—Continued: Page

United States v. *Martinez*, 922 F.d 914 (1st Cir. 1991) 15
United States v. *Matos*, 907 F.2d 274 (2d Cir. 1990) 9
United States v. *Ogbeifun*, 949 F.2d 1013 (8th Cir. 1991) 9
United States v. *O'Meara*, 895 F.2d 1216 (8th Cir.), cert. denied, 111 S. Ct. 352 (1990) 9
United States v. *Wagner*, 884 F.2d 1090 (8th Cir. 1989), cert. denied, 494 U.S. 1088 (1990) 9
United States v. *Wallace*, 904 F.2d 603 (11th Cir. 1990) 9
Williams v. *New York*, 337 U.S. 241 (1949) 10-11

Statutes and rules:

Sentencing Reform Act of 1984:
18 U.S.C. 3551-3742 12
18 U.S.C. 3553(a) (2) (C) 14
18 U.S.C. 3577 (1982) 11
18 U.S.C. 3661 12
28 U.S.C. 991-998 12

United States Sentencing Guidelines:
§ 3C1.1 (Nov. 1989) ..... *passim*
Application Note 1(c) (Nov. 1989) 13
Commentary 6, 13
§ 3C1.1 (Nov. 1991) 2
§ 6A1.3 (Policy Statement) (Nov. 1991) 12
21 U.S.C. 846 2

Miscellaneous:

United States Sentencing Comm'n, *Guidelines Manual* App. C, amendment 347 (Nov. 1991) 13

In the Supreme Court of the United States

OCTOBER TERM, 1991

No.

UNITED STATES OF AMERICA, PETITIONER

v.

SHARON DUNNIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-15a, is reported at 944 F.2d 178. The opinion dissenting from the denial of rehearing en banc, App., *infra*, 18a-28a, is reported at 950 F.2d 149.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1991. A petition for rehearing was denied on November 13, 1991. App., *infra*, 16a-17a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

SENTENCING GUIDELINE INVOLVED

The 1989 version of Sentencing Guidelines § 3C1.1, which applied to respondent's sentencing, provided as follows:

> If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by 2 levels.

The current version of Sentencing Guidelines § 3C1.1 provides as follows:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

STATEMENT

After a jury trial in the United States District Court for the Southern District of West Virginia, respondent was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. She was sentenced to 51 months' imprisonment, to be followed by a three-year term of supervised release. C.A. App. 338-341. The court of appeals affirmed her conviction, but vacated her sentence and remanded the case for resentencing.

1. Respondent Sharon Dunnigan belonged to an organization headed by Freddie Harris, a cocaine dealer in the Charleston, West Virginia, area. The organization was broken up in the late summer of 1988. Harris and a number of co-conspirators subsequently pleaded guilty to cocaine distribution charges. App. *infra*, 2a.

Respondent was charged with conspiring to distribute cocaine with Harris and others during the summer of 1988. At respondent's trial, Harris and four other former co-conspirators testified against her. The evidence showed the following: Respondent served as Harris's source of cocaine in Cleveland, Ohio. On several occasions during the summer of 1988, she traveled to Cleveland alone, with Harris, and with another co-conspirator to obtain cocaine and other drugs. Respondent was also involved in the testing, preparation, and packaging of cocaine for Harris's organization. She tested and packaged cocaine at her apartment, and she employed her daughter to convert powdered cocaine into the form known as "crack" and to sell it in that form. App., *infra*, 2a-4a; Tr. 6-17, 52-56, 67-68, 81-101, 115-118, 141-142, 152-155, 164-165, 173-177.

Respondent's defense was simple; as the court of appeals put it, she "took the stand and denied everything." App., *infra*, 4a. Respondent testified that she did not buy, sell, or use cocaine and that she did not know anyone in Cleveland who used cocaine. She admitted traveling to Cleveland, but she testified that the purpose of those trips was to visit relatives. *Id.* at 5a. Respondent denied knowing whether anyone had manufactured crack cocaine at her apartment. On cross-examination, the government asked respondent whether she had sold crack to an Edward Dickerson on July 12, 1988, at her apartment. Respondent denied having done so. *Ibid.*; Tr. 188-195, 198-205.

On rebuttal, Edward Dickerson testified that he became an informant in 1988 and that law enforcement officials monitored a drug transaction that he engaged in with respondent in the summer of 1988.

During that transaction, Dickerson stated, he purchased crack cocaine from respondent at her apartment. The officer involved in the investigation corroborated Dickerson's testimony. Another cooperating co-conspirator testified that she also purchased crack cocaine from respondent. She said that she saw respondent give crack and powdered cocaine to respondent's daughter and that respondent's daughter sold crack for respondent. App., *infra*, 5a; Tr. 209-213, 232-235, 241-245. The jury convicted respondent.

2. At sentencing, the district court found that respondent lied when she testified at trial. The court therefore enhanced her offense level by two levels on the ground that, by committing perjury at trial, she had obstructed justice within the meaning of Sentencing Guidelines § 3C1.1. 5/21/90 Tr. 34 (C.A. App. 324).[1] The two-level enhancement increased respondent's offense level from 22 to 24. With a criminal history category of I, respondent was subject to a sentencing range of 51-63 months' imprisonment. The district court sentenced respondent at the bottom of that range.

3. The court of appeals vacated respondent's sentence and remanded for resentencing. App., *infra*,

[1] The district court observed, 5/21/90 Tr. 34 (C.A. App. 324):

> The court finds this defendant was untruthful at trial with respect to material matters in this case. The defendant denied her involvement when it is clear from the evidence in the case as the jury found beyond a reasonable doubt that she was involved in the conspiracy alleged in the indictment, and by virtue of her failure to give truthful testimony on material matters that were designed to substantially affect the outcome of the case, the court concludes that the false testimony at trial warrants an upward adjustment by two levels.

1a-15a. The court acknowledged that every other circuit to consider the issue has upheld the constitutionality of applying the enhancement authorized by Sentencing Guidelines § 3C1.1 to defendants who commit perjury at their trials. The court stated, however, that "[o]ur sense of justice requires us to disagree." App., *infra*, 10a. The court expressed a "fear that this enhancement will become the commonplace punishment for a convicted defendant who has had the audacity to deny the charges against him," because "[n]early all testifying defendants tell a story that, if believed in full, would result in acquittal. The jury's verdict implies a disbelief of some material aspect of the defendant's testimony." *Ibid.* The court was disturbed by the prospect that "testimony by an accused in his own defense, so basic to justice, is deemed to 'obstruct' justice unless the accused convinces the jury." *Ibid.* The court said that many factors, such as the prospect of being impeached with a prior conviction, already discourage defendants from testifying, and the prospect of receiving an "automatic" enhancement under Sentencing Guidelines § 3C1.1 may lead a defendant to believe that testifying is not "worth the risk." App., *infra*, 12a.

The court of appeals recognized that in *United States* v. *Grayson*, 438 U.S. 41 (1978), this Court ruled that a sentencing court may consider the fact that the defendant testified falsely at trial. App., *infra*, 12a. Nonetheless, the court found that *Grayson* did not settle the question of the constitutionality of a "perjury enhancement" under the Sentencing Guidelines. "The most basic difference" between this case and *Grayson*, the court found, "is the stated justification for enhancing sentence." *Ibid.* "The

guidelines deem a denial of guilt on the stand 'obstruction of justice,'" the court stated, whereas *Grayson* allowed the trial courts to consider a defendant's untruthfulness "for the purpose of illuminating his need for rehabilitation and the society's need for protection." *Id.* at 12a-13a (quoting *Grayson*, 438 U.S. at 53). The court further noted that *Grayson* did not require "a sentencing judge to enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false," while the Sentencing Guidelines require just such a "'wooden or reflex' enhancement." App., *infra*, 13a (quoting *Grayson*, 438 U.S. at 55).

The court of appeals found that there are insufficient safeguards in place to prevent Section 3C1.1 from coercing a defendant into remaining silent at trial. In particular, the court believed that the trial judge's decision to enhance the defendant's sentence under Sentencing Guidelines § 3C1.1 is effectively unreviewable on appeal. "[I]n light of the jury's verdict of guilt, the district court's finding will never be 'clearly erroneous' where the verdict is sustainable; if the verdict cannot be supported, the sentencing finding will of course become moot." App., *infra*, 14a. The admonition in the Commentary to Sentencing Guidelines § 3C1.1 that a district court should view the defendant's testimony in the light most favorable to him was also ineffectual, the court believed, because "a defendant's testimony that has been apparently rejected in material respects by a jury will almost always compel a finding of untruthfulness." App., *infra*, 14a. The court therefore concluded that "[t]he rigidity of the guidelines makes the § 3C1.1 enhancement for a disbelieved denial of guilt under oath an intolerable burden on the defendant's right to testify in his own behalf." App., *infra*, 15a.

4. The government sought rehearing en banc, which the court of appeals denied by a 6-6 vote. App., *infra*, 16a-17a. Judge Wilkins filed an opinion dissenting from the denial of rehearing en banc, which was joined by Judges Wilkinson, Niemeyer, and Luttig. *Id.* at 18a-28a. Judge Wilkins noted that "[n]ot only does the panel adopt a position at odds with every circuit that has addressed this question, but it does so on a constitutional basis, thereby preventing the United States Sentencing Commission from using its authority, acknowledged in *Braxton* v. *United States*, [111 S. Ct. 1854, 1857-1858 (1991)], to resolve the conflict." App., *infra*, 19a n.2.

Judge Wilkins explained that because the Sentencing Commission sought to further traditional sentencing goals such as retribution, incapacitation, and deterrence, perjured testimony by the defendant is still an appropriate sentencing consideration, just as it was at the time of *Grayson*. App., *infra*, 21a. In addition, he explained that, contrary to the panel's assumption, Sentencing Guidelines § 3C1.1 "is not to be applied indiscriminately to every defendant who testifies and is ultimately convicted." App., *infra*, 22a. In response to the panel's concern that a defendant whose sentence was enhanced because he committed perjury could not effectively challenge the district court's finding on appeal, Judge Wilkins cited a number of cases in which courts of appeals had reversed what they saw as inappropriate applications of the perjury enhancement. *Id.* at 23a-24a. He added that "not a single appellate court has affirmatively supported the type of automatic, mechanistic enhancement over which the panel expresses its concern." *Id.* at 24a.

Finally, Judge Wilkins found implausible the claim that a defendant would be chilled from testifying by the fear of receiving an enhanced sentence for perjury under Sentencing Guidelines § 3C1.1. To the contrary, Judge Wilkins explained, the Guidelines are likely to reduce any such chilling effect. He reasoned that under the Guidelines, a defendant "who previously confronted the possibility of a virtually unlimited increase in his sentence if he took the stand on his own behalf but was ultimately convicted, would now be *more* likely to exercise his right when the downside risk he faces has been quantified and limited." App., *infra*, 27a-28a.

REASONS FOR GRANTING THE PETITION

The court of appeals has decided a question of considerable importance to the federal criminal justice system in a manner that expressly conflicts with the decisions of eight other courts of appeals. In holding that Sentencing Guidelines § 3C1.1 cannot constitutionally be applied to a defendant who testifies falsely at trial, the court of appeals disregarded Congress's directive that "no limitation" shall be placed on the information a district court may consider at sentencing, as well as this Court's holding in *United States* v. *Grayson*, 438 U.S. 41 (1978), that a district court may consider, for sentencing purposes, a defendant's perjury at trial without infringing the defendant's right to testify. Given the frequency with which this question will arise, review by this Court is clearly warranted.

1. There is a clear conflict among the courts of appeals on the question whether Sentencing Guidelines § 3C1.1 can constitutionally be applied to a defendant who testifies falsely at trial. Nine circuits have addressed that question. Each of those courts—

other than the court below—has held that the Constitution does not prohibit a district court from enhancing a defendant's sentence under Guidelines § 3C1.1 if the court finds that the defendant gave false testimony at trial. See *United States* v. *Bautista-Polanco*, 927 F.2d 14, 22 (1st Cir. 1991);[2] *United States* v. *Matos*, 907 F.2d 274, 276 (2d Cir. 1990); *United States* v. *Acosta-Cazares*, 878 F.2d 945, 953 (6th Cir.), cert. denied, 493 U.S. 899 (1989); *United States* v. *Contreras*, 937 F.2d 1191, 1194-1195 (7th Cir. 1991); *United States* v. *Wagner*, 884 F.2d 1090, 1098-1099 (8th Cir. 1989), cert. denied, 494 U.S. 1088 (1990);[3] *United States* v. *Barbosa*, 906 F.2d 1366, 1369-1370 (9th Cir.), cert. denied, 111 S. Ct. 394 (1990); *United States* v. *Beaulieu*, 900 F.2d 1537, 1539-1540 (10th Cir.), cert. denied, 110 S. Ct. 3252 (1990);[4] *United States* v. *Wallace*, 904 F.2d 603, 604-605 (11th Cir. 1990).

After the Fourth Circuit issued its decision in this case, the Seventh and Eighth Circuits reconsidered the question whether Sentencing Guidelines § 3C1.1 may constitutionally be applied to perjury at trial. After doing so, both courts rejected the Fourth Circuit's analysis and reaffirmed their prior holdings. *United States* v. *Jones*, Nos. 90-3498 *et al.* (7th Cir. Dec. 19, 1991), slip op. 11; *United States* v. *Ogbeifun*, 949 F.2d 1013, 1013-1014 (8th Cir. 1991). Accordingly, there is a square conflict among the cir-

---

[2] Accord *United States* v. *Akitoye*, 923 F.2d 221, 228 (1st Cir. 1991).

[3] Accord *United States* v. *O'Meara*, 895 F.2d 1216, 1220 (8th Cir.), cert. denied, 111 S. Ct. 352 (1990).

[4] Accord *United States* v. *Keyes*, 899 F.2d 983, 988 (10th Cir.), cert. denied, 111 S. Ct. 160 (1990).

cuits on the constitutionality of applying the two-level enhancement of Sentencing Guidelines § 3C1.1 to a defendant who commits perjury at trial.

2. The question whether Sentencing Guidelines § 3C1.1 can constitutionally be applied in such circumstances will arise with considerable frequency. The issue has arisen on numerous occasions since the Sentencing Guidelines went into effect on November 1, 1987, and it is certain to recur with regularity, since there are hundreds of federal criminal cases each year in which a testifying defendant is convicted. It is important for the district courts to know in such cases whether to apply the Guidelines sentencing enhancement if they find that the defendants testified falsely at trial. Because the Fourth Circuit's ruling is based on an interpretation of the Constitution, the conflict among the circuits cannot be resolved by modifying the Guidelines, other than by wholesale abandonment of the position that perjury at trial is a legitimate sentencing enhancement factor. And because the Fourth Circuit appears to be committed to its minority position, see *United States* v. *Craigo*, No. 90-5351 (4th Cir. Feb. 3, 1992), slip op. 5-6 (following the decision below), the conflict is one that will require this Court's intervention to resolve.

3. The decision below is clearly incorrect. Before the Sentencing Guidelines went into effect, a district court could take into account at sentencing its belief that the defendant committed perjury when he testified. Nothing in the Sentencing Guidelines altered that well-settled rule or justifies the conclusion that the Constitution requires that a different balance now must be struck.

a. This Court has long recognized that "[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest

information possible concerning the defendant's life and characteristics." *Williams* v. *New York*, 337 U.S. 241, 247 (1949). To ensure that the district courts would have the widest possible range of information available at sentencing, Congress directed that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3577 (1982).

Among the factors that courts commonly took into account at sentencing was the defendant's commission of perjury while testifying at his trial. This Court endorsed that practice in *United States* v. *Grayson*, *supra*. *Grayson* recognized that "[a] defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing." 438 U.S. at 50. See *id.* at 53 ("the evolutionary history of sentencing * * * demonstrates that it is proper—indeed, even necessary for the rational exercise of discretion—to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light those may shed on the sentencing decision"). This Court found "persuasive" the proposition that even "'[i]f the notion of "repentance" is out of fashion today, the fact remains that a manipulative defiance of the law is not a cheerful datum for the prognosis a sentencing judge undertakes.'" *Id.* at 51 (citation omitted).

The Court in *Grayson* deemed "without basis" the claim that allowing the courts to consider a defendant's false testimony would impermissibly "chill" a defendant's willingness to exercise his right to testify

on his own behalf. As the Court explained, even if a sentencing judge's consideration of a defendant's untruthfulness might have a chilling effect on the defendant's decision to testify falsely, "that effect is entirely permissible. There is no protected right to commit perjury." 438 U.S. at 54. The Court treated as "entirely frivolous" the proposition that allowing sentencing courts to follow this practice would inhibit defendants from testifying truthfully. *Id.* at 55. *Grayson* thus makes clear that the Constitution does not prohibit a court from enhancing the defendant's sentence on the ground that he perjured himself while testifying at trial.

b. Nothing in the Sentencing Reform Act of 1984, 18 U.S.C. 3551-3742 and 28 U.S.C. 991-998, and the Sentencing Guidelines renders the principles described by the Court in *Grayson* inapplicable to modern federal sentencing. Although in the 1984 Act Congress sought to channel the courts' exercise of their sentencing discretion, it did not restrict the information that district courts may consider at sentencing. On the contrary, Congress reaffirmed the prior rule that "[n]o limitation" should be placed on the information that district courts may take account of at sentencing. 18 U.S.C. 3661.

The Sentencing Guidelines incorporate that principle as well. Section 6A1.3 of the Guidelines provides that district courts may consider any reliable evidence at sentencing.[5] In particular, the Sentencing Guidelines make clear that a district court must con-

[5] Section 6A1.3 (Policy Statement) provides that:

> (a) * * * In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

sider whether the defendant gave false testimony at trial. Section 3C1.1 of the Guidelines requires the court to give a two-level enhancement for obstruction of justice, and the Commentary to the Guideline explains that "the types of conduct to which this enhancement applies" include "committing * * * perjury."[6] Accordingly, Sentencing Guidelines § 3C1.1 authorizes a district court to impose the type of sentencing enhancement that this Court upheld in *Grayson*. As the Seventh Circuit put it, Section 3C1.1 is "merely the technical means by which sentencing courts can continue under the Guidelines to consider the kind of evidence approved by the Court in *Grayson*." *Contreras*, 937 F.2d at 1195.

c. The reasons given by the court of appeals do not justify the conclusion that Sentencing Guidelines § 3C1.1 cannot constitutionally be applied to a defendant who gives false testimony at trial.

First, the court found it significant that Sentencing Guidelines § 3C1.1 classifies the defendant's false testimony as "obstruction of justice," whereas *Grayson* treated a defendant's perjury as simply one factor bearing on rehabilitation and incapacitation. App., *infra*, 12a-13a. The label used to describe Sentencing Guidelines § 3C1.1, however, does not govern

[6] The version of the Commentary that was in effect at the time of respondent's sentencing was essentially the same. It provided that "testifying untruthfully * * * concerning a material fact" was one of the grounds for applying the Section 3C1.1 enhancement. Guidelines § 3C1.1, Application Note 1(c) (Nov. 1989). Although the Guideline itself has been amended since the time of petitioner's sentencing, the only material change was the addition of a reference to the obstruction of justice at sentencing. *Guidelines Manual* App. C, amendment 347, at 163 (Nov. 1991). The other changes in the Guideline and application notes were intended only for clarification. *Ibid.*

the question of its constitutionality. Moreover, it is clear that enhancing a defendant's sentence based on his willingness to commit perjury is consistent with the penological goals on which the Guidelines are based. A defendant who commits perjury at trial indicates his willingness to break the law whenever he finds it in his interest. Because a willingness to break the law is indicative of the defendant's continuing danger to the community, it justifies incapacitating him for a longer period than would otherwise be necessary. See 18 U.S.C. 3553(a)(2)(C) (sentence should "protect the public from further crimes of the defendant").

To be sure, the Sentencing Guidelines do not leave the consideration of trial perjury to the sentencing court's discretion; the Guidelines require a court to enhance a defendant's sentence for perjury, and they specify how much weight that factor will have. But the mandatory nature of the Guidelines in this regard is simply the inevitable result of channeling the courts' discretion through a system of Sentencing Guidelines; it is not a veiled effort to punish the defendant for a new offense. The use of the label "obstruction of justice" to describe the enhancement for perjury at trial therefore does not make that enhancement unconstitutional.

Second, the court of appeals believed that the enhancement imposed by Sentencing Guidelines § 3C1.1 would be applied to every testifying defendant who is convicted. App., *infra*, 13a-14a.[7] That view is

[7] Relying on a statement made at the oral argument by an Assistant United States Attorney, the Fourth Circuit believed that the government's position is that "every defendant who takes the stand and is convicted should be given the obstruction of justice enhancement." App., *infra*, 10a. That is not our position. In our rehearing petition, we pointed out that we do not take the position that every testifying defendant who is convicted should, for that reason alone, receive an enhancement under Sentencing Guidelines § 3C.1.

mistaken. Guidelines § 3C1.1 requires a court to impose an enhancement in every case in which the court finds that a defendant committed perjury while testifying, but it does not require an enhancement just because a defendant testifies and is convicted. That distinction is important, because a testifying defendant who is convicted does not, by that fact alone, "obstruct justice" under Sentencing Guidelines § 3C1.1.[8]

Third, the court of appeals noted that in *Grayson* this Court left a district court discretion whether to enhance the defendant's sentence if he testified falsely, whereas Sentencing Guidelines § 3C1.1 *requires* a court to enhance the defendant's sentence if the court finds that the defendant gave false testimony. App., *infra*, 13a. The court believed that the "automatic" nature of the Section 3C1.1 enhance-

[8] That point is illustrated by the Seventh Circuit's decision in *United States* v. *Lozoya-Morales*, 931 F.2d 1216 (1991). There, the district court penalized the defendant under Sentencing Guidelines § 3C1.1 for his untruthful trial testimony, stating that "[i]f a defendant gets up on the stand and gives a story that the jury does not believe, the jury is finding that he is not telling the truth." 931 F.2d at 1218. The court of appeals rejected that approach, stating that it is improper to "[i]mpos[e] the penalty automatically from a jury verdict that concededly does not establish the defendant lied in his testimony." *Id.* at 1219. Only if the district court finds that the defendant perjured himself (or if the record compels such a conclusion) would the Section 3C1.1 enhancement be warranted. 931 F.2d at 1219-1220. See also *United States* v. *Martinez*, 922 F.2d 914, 925-926 (1st Cir. 1991) (rejecting claim that defendant may be found to have committed obstruction of justice under Section 3C1.1 simply because he testified and the jury nevertheless convicted him).

ment might tip the scales against testifying for "an innocent defendant with prior convictions." App., *infra*, 11a-12a. But as Judge Wilkins noted in dissent from denial of en banc review, respondent was in a position to make a precise calculation of what perjury might cost her, *i.e.*, the addition of two levels to her base offense level. Prior to the Guidelines, the district courts enjoyed unfettered discretion to penalize defendants up to the statutory maximum when the courts found the defendants had testified falsely at trial. Moreover, in the pre-Guidelines era a district court did not have to state reasons for the sentence imposed. A defendant therefore could never be sure that the court would not enhance his sentence just because the jury convicted him. By contrast, the district court cannot impose an enhancement under Sentencing Guidelines § 3C1.1 simply because a defendant is convicted after testifying; the court must make a finding that the defendant committed perjury before enhancing a defendant's sentence on that ground. Accordingly, it is far from clear that the "chilling" effect of using trial perjury to enhance a sentence is any greater under the Guidelines than it was under the pre-Guidelines regime.

In sum, the change-over to the Sentencing Guidelines system did not have the dual effect of (1) rendering this Court's analysis in *Grayson* inapplicable and (2) creating a constitutional bar to a sentencing court's consideration of the defendant's perjury at trial. All the courts of appeals except the Fourth Circuit agree that *Grayson* applies under the Sentencing Guidelines, just as it did before. This Court should grant review to resolve the conflict between the Fourth Circuit and the other courts of appeals on that important constitutional question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

ANDREW LEVCHUK
Attorney

FEBRUARY 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5668

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SHARON DUNNIGAN, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston
John T. Copenhayer, Jr., District Judge
(CR-89-36)

Argued: April 12, 1991

Decided: August 30, 1991

Before HALL and PHILLIPS, Circuit Judges, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

HALL, Circuit Judge:

Sharon Duningan appeals her conviction and sentence for conspiracy to distribute cocaine. We affirm her conviction; however, we vacate her sentence and remand for resentencing.

I.

The cocaine distribution conspiracy in this case is not complex. Freddie Harris was a notorious cocaine dealer in the Charleston, West Virginia, area. His ring was broken up in the late summer of 1988. Harris pled guilty to cocaine distribution charges, as did his coconspirators John Dean, Doris Casto, Wynema Brown, and Tammy Moore. Several others went to trial, including Andre Charlton and, later, appellant Sharon Dunnigan.

Dunnigan was charged March 7, 1989, in a one-count indictment, with conspiracy to distribute cocaine with Harris and unnamed others during the summer of 1988. She filed pretrial motions to dismiss the indictment, for a bill of particulars and for disclosure of exculpatory and Jencks Act material.

At a hearing on the motions, the government agreed to provide Jencks Act material, notice of "similar acts" evidence, and information regarding any confidential informants. The defendant withdrew her motion for a bill of particulars. The district court denied the motion to dismiss the indictment.

Between the hearing on motions and trial, the government furnished grand jury transcripts, plea agreements and rap sheets for proposed government witnesses, and notice of one "similar act"—a controlled sale of crack cocaine by Dunnigan to a cooperating witness, Edward Dickerson, on July 12, 1988.

Trial was held January 3-4, 1990. The government presented five witnesses in its case-in-chief. Harris, the ringleader, was first. He testified that

Dunnigan was his source of supply in Cleveland, and that she had travelled to Cleveland alone and with him to obtain cocaine during the summer of 1988. Harris also stated that Dunnigan had accompanied Dean to Cleveland for the same purpose at least once. Harris admitted distributing the cocaine in the Charleston area.

Dean took the stand next. Dean met the appellant when, on Harris' instructions, he picked her up at the Charleston bus terminal and took her home. Harris had described Dunnigan to Dean as his "connect." Later that evening, Dean accompanied Harris to Dunnigan's apartment; Harris went inside and obtained cocaine, which Dean then helped package for resale. Dean also testified that he went to Cleveland with Dunnigan on several occasions to purchase cocaine and dilaudid. At the close of Dean's direct examination, the government elicited from him that he was a paranoid schizophrenic and heroin addict.

Dunnigan's counsel was surprised by this revelation. He protested to the court that his cross-examination would be hampered by the government's failure to provide this information before trial notwithstanding a specific discovery request. The government argued that the grand jury transcripts revealed that Dean was a heroin addict, and that it had no documentary evidence to substantiate Dean's mental illness. The district court advised the defendant that Dean's schizophrenia could be inquired into on cross-examination. Dunnigan's trial counsel nonetheless asked no cross-examination questions about Dean's addiction or mental disorders.

Charlton testified next. He said that he had gone with Harris to Dunnigan's apartment to test and package cocaine Dunnigan had brought from Cleve-

land. He also recounted one occasion on which he had received cocaine from Dean. This cocaine had been picked up in Cleveland on one of Dean and Dunnigan's trips together.

Moore was the fourth coconspirator witness. She told of conversations with Dunnigan during which Dunnigan extolled the superior quality of Cleveland cocaine and attempted to solicit Moore to drive her to Cleveland.

Finally, the government called Brown. She stated that Dunnigan had told her of the Cleveland cocaine-purchasing trips, and that she had seen cocaine in Dunnigan's apartment. On four or five occasions, Brown observed Dunnigan's daughter "rocking up" powder cocaine (i.e. making it into crack) for Dunnigan. Dunnigan would later return the crack cocaine to her daughter to sell. Brown also stated that Dunnigan kept cocaine in a little tin case. The defendant made no objections to any of Brown's testimony and pursued no cross-examination. Notwithstanding this lack of protest, the district court gave a "similar acts" instruction—if the jury believed the cocaine that Dunnigan's daughter "rocked up" was part of the conspiracy, it could consider it for that purpose; however, the court stated, Dunnigan was not charged with distributing crack, and if the cocaine from which it was made was outside the conspiracy, the jury could only consider the evidence for the limited purposes of Fed. R. Evid. 404(b): motive, intent, preparation, lack of mistake, and knowledge.

The government rested, and Dunnigan presented a simple defense. She took the stand and denied everything. She testified that she did not buy, sell, or use cocaine during the time she knew Harris. She said

that she did not know anyone in Cleveland who used cocaine.

She admitted going to Cleveland, but only to visit relatives. She said that she went to Cleveland with Harris once, because she knew her way around, but she did not know whether Harris bought or tried to buy any cocaine on that trip. She flatly denied the trips and transactions described by Dean and Charlton, and she had no knowledge of anyone making cocaine into crack at her apartment.

On cross-examination, the government asked her about a specific transaction: whether she had sold crack to Edward Dickerson on July 12, 1988, at her apartment. She denied it.

The defense rested, and the government began a devastating rebuttal. Dickerson was the first witness. He testified that he had been arrested in early 1988 and had become an informant. On July 12, 1988, in a monitored transaction, he bought crack from Dunnigan at her apartment. Dunnigan did not object to this testimony.

Moore then retook the stand to describe her purchases of crack cocaine from the defendant. She had also seen Dunnigan give crack and powder cocaine to her daughter. Finally, Moore said that she and Dunnigan's daughter sold crack together and returned part of the money to Dunnigan. Again, the defendant did not object to any of Moore's story. Again, the district court gave the jury a "similar acts" limiting instruction.

The jury found Dunnigan guilty. Her base offense level for sentencing was 22. She did not receive the two-level acceptance of responsibility reduction, because she continued to maintain her innocence. Moreover, the district court increased the offense level

by 2 to 24 for "obstruction of justice," based on its finding that Dunnigan testified untruthfully at her trial. She was sentenced to 51 months, the lowest end of the guideline range.

II.

Dunnigan first argues that the district court erred by denying her motions to dismiss the indictment and for a bill of particulars. These arguments are related, because a bill of particulars is a defendant's means of obtaining specific information about charges brought in a vague or broadly-worded indictment. *United States v. Debrow*, 346 U.S. 374, 378 (1953).

An indictment may simply be a short, plain statement of the charge, sufficiently precise to notify the defendant of the accusation he must meet and to protect him from double jeopardy. *United States v. American Waste Fiber Co.*, 809 F.2d 1044, 1046 (4th Cir. 1987). The indictment of Dunnigan was sufficient. It identified the time frame of the activity (early to late summer of 1988), the place (at or near Charleston), a coconspirator (Harris), the controlled substance involved, and the statutes violated. The indictment tracked the statutory language defining the offense and apprised Dunnigan that other unnamed coconspirators, whose identities were known and unknown to the grand jury, were involved.

Among her pretrial motions, Dunnigan moved for a bill of particulars. She wanted the names of those to whom she had allegedly sold cocaine, notice of any "similar acts" the government planned to use, and the like. At a pretrial hearing on the motions, Dunnigan's counsel was satisfied with the government's proposed disclosures and specifically dropped the request for a bill of particulars. Waivers are rarely more explicit. In any event, Dunnigan was given the names of the government's witnesses and received grand jury transcripts. The denial of a bill of particulars did not leave her facing a trial unaware of the nature of the charges against her.

III.

Ordinarily, proof of crimes or bad acts other than those charged is inadmissible to show that the defendant acted in conformity with a character trait. However, the evidence of such acts is admissible for limited collateral purposes such as knowledge, intent, motive, absence of mistake, and common scheme or plan. Fed. R. Evid. 404.

Dunnigan now argues that she was hopelessly prejudiced by admission of the testimony that she helped her daughter use and sell crack cocaine. We do not doubt that this testimony was very damaging; however, Dunnigan made no objections to this evidence at trial, and the court may reverse only if admission of the evidence was plain error.

All of the "similar acts" evidence presented on rebuttal was invited by Dunnigan. She denied using cocaine or knowing that anyone sold cocaine out of her house. The government was entitled to rebut these assertions.

A closer issue is Brown's testimony in the government's case-in-chief about Dunnigan giving her daughter cocaine to "rock up." Nonetheless, Dunnigan did not object, and the district court *sua sponte* gave a limiting instruction. Admitting the testimony with a limiting instruction does not rise to plain error, if error at all.

IV.

The government now admits, albeit equivocally, that it should have disclosed Dean's schizophrenia before trial. "If Dean's mental condition was such that it would have reflected adversely on his credibility, the United States should have provided this information to the defendant." Brief of the United States, at 39.[1] However, every *Brady*[2] violation does not warrant reversal. Only where the evidence is so material that its nondisclosure undermines confidence in the confidence in the verdict is reversal necessary. *United States v. Bagley*, 473 U.S. 667 (1985).

Dunnigan did not request a continuance and did not ask a single question on cross-examination about Dean's condition. Moreover, though the exculpatory evidence may not have been presented as fully as Dunnigan would have liked (though she does not say what else she would now offer), the jury did in fact hear it. Dunnigan would have a better argument if the government had withheld the information from the jury. Finally, Dean was one of a half-dozen government witnesses telling the same story; his testimony was important, but not vital.

Our confidence in the verdict is not undermined by the nondisclosure of Dean's mental problems. Therefore, any *Brady* error was harmless.

---

[1] The Assistant U.S. Attorney on appeal did not represent the government at trial. The trial prosecutor interpreted her duty to disclose exculpatory information to apply only to documentary evidence.

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

V.

A.

The district court found that Dunnigan had testified untruthfully at trial, and so enhanced her offense level by two for "obstruction of justice." Committing or suborning perjury has always been identified as "obstruction of justice" in the Guidelines Commentary. U.S.S.G. § 3C1.1, comment. (n.1(c)) (Nov. 1989); *Id.*, comment. (n.3(b)) (Nov. 1990).

At the time Dunnigan was charged, convicted, and sentenced, Application Note 3 to U.S.S.G. § 3C1.1 stated: "This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt is not a basis for application of this provision." Furthermore, Application Note 2 stated that "suspect testimony and statements should be evaluated in a light most favorable to the defendant."[3]

---

[3] Effective November 1, 1990, the substance of former Application Notes 2 and 3 were amalgamated into new note 1:

> This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision, the defendant's testimony and statements should be evaluated in a light most favorable to the defendant.

The primary purpose of the 1990 amendment was to add a new guideline governing "reckless endangerment during flight." The other changes, including the one described above, were intended only for clarification. United States Sentencing Commission, *Guidelines Manual*, Appendix C, amendment 347 (Nov. 1990).

All circuits that have considered the issue have upheld the constitutionality of similar enhancements under § 3C1.1. These decisions are based on the premise that a defendant's right to testify in his own behalf is not a license to commit perjury. *United States v. Batista-Polanco*, 927 F.2d 14, 22 (1st Cir. 1991); *United States v. Matos*, 907 F.2d 274, 276 (2nd Cir. 1990); *United States v. Acosta-Cazares*, 878 F.2d 945, 953 (6th Cir.), *cert. denied*, 110 S.Ct. 255 (1989); *United States v. O'Meara*, 895 F.2d 1216 (8th Cir.), *cert. denied*, 111 S.Ct. 352 (1990); *United States v. Barbosa*, 906 F.2d 1366, 1369 (9th Cir.), *cert. denied*, 111 S.Ct. 394 (1990); *United States v. Keys*, 899 F.2d 983 (10th Cir.), *cert. denied*, 111 S.Ct. 160 (1990); *United States v. Wallace*, 904 F.2d 603, 604-605 (11th Cir. 1990).

B.

Our sense of justice requires us to disagree. We of course have no desire to condone or encourage perjury. On the other hand, we fear that this enhancement will become the commonplace punishment for a convicted defendant who has had the audacity to deny the charges against him. The government maintained at oral argument that every defendant who takes the stand and is convicted should be given the obstruction of justice enhancement. Certainly, if the guidelines are to be applied consistently, the government would be right. Nearly all testifying defendants tell a story that, if believed in full, would result in acquittal. The jury's verdict implies a disbelief of some material aspect of the defendant's testimony.

It disturbs us that testimony by an accused in his own defense, so basic to justice, is deemed to "obstruct" justice unless the accused convinces the jury.

The facile logic of hindsight deems such disbelieved testimony a lie; inasmuch as there is no right to lie, there is no harm in sanctioning it. Hindsight, however, does not help the accused when he must decide whether to take the stand. He already knows that he faces the possibility of conviction, and that he is much less likely to be acquitted if he remains silent, despite his right to do so and even in the face of instructions to the jury to draw no adverse inference from his silence. Kassin, The American Jury: Handicapped in the Pursuit of Justice, 51 Ohio St. L.J. 687, 700 (1990), *citing* Shaffer & Case, On the Decision Not to Testify in One's Own Behalf: Effects of Withheld Evidence, Defendant's Sexual Preferences, and Juror Dogmatism on Juridic Decisions, 42 J. Personality & Soc. Psychology 335, 344 (1982); Note, The Influence of the Defendant's Plea on Judicial Determination of Sentence, 66 Yale L.J. 204, 212 n.36 (1956). *See Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978) (adverse inference from silence "may be inevitable"). Moreover, the dilemma does not arise solely when the defendant is guilty; there are many reasons unrelated to guilt that may militate against testifying. Chief among these is the prosecution's power to impeach the defendant's credibility with prior convictions under Fed. R. Evid. 609. *Carter v. Kentucky*, 450 U.S. 288, 300 n.15 (1981); *Wilson v. United States*, 149 U.S. 60, 66 (1893); Bradley, *Griffin v. California*: Still Viable After All These Years, 79 Mich. L. Rev. 1290, 1295 n.25.[4] We cannot help but note that an innocent defendant with prior convictions must weigh the

[4] Bradley cites statistics from Kalvin & Zeisel, The American Jury 146 (1966), that defendants without prior records are 37% more likely to testify than those with previous convictions. *Id.*

jury's likelihood of drawing one impermissible inference (guilt by silence) against another (guilt by criminal propensity) in deciding whether to testify. With an automatic § 3C1.1 enhancement added to the ante, the defendant may not think testifying worth the risk.[5]

C.

Several of our fellow circuits have relied upon *United States v. Grayson*, 438 U.S. 41 (1978), a pre-guidelines case, as controlling and permitting this enhancement. Some have explicitly stated that the guidelines have not altered the analysis. *E.g.*, *Barbosa*, 906 F.2d at 1369; *United States v. Beaulieu*, 900 F.2d 1537 (10th Cir.), *cert. denied*, 110 S.Ct. 3252 (1990). We believe that a close look at *Grayson*'s rationale reveals that the guidelines have removed important underpinnings of the Court's analysis.

The most basic difference in *Grayson* is the stated justification for enhancing sentence. The guidelines deem a denial of guilt on the stand "obstruction of justice." There is no such rationale in *Grayson*. *Grayson* rejected an argument that due process prohibits consideration at sentencing of the defendant's untruthfulness, because it amounts to punishment for perjury without indictment and trial for perjury. The Court acknowledged that punishment for perjury to save the government the time and expense of prosecution would be "impermissible," but refused to prohibit the "otherwise *permissible* practice of considering a defendant's untruthfulness for the purpose of

[5] For example, the enhancement increased Dunnigan's guidelines range from 41-51 to 51-63 months. At the highest offense levels, the increase is more drastic, from 292-365 months to 360-life.

illuminating his need for rehabilitation and the society's need for protection." 438 U.S. at 53.

The Court was speaking during the long period of our judicial history when district courts enjoyed broad discretion in imposing any sentence within statutory limits. It found that the very uncertainty of a defendant's supposedly untrue trial testimony being considered at sentencing was a defense against Grayson's constitutional attack:

> Nothing we say today requires a sentencing judge to enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false. Rather, we are reaffirming the authority of a sentencing judge to evaluate carefully a defendant's testimony on the stand, determine—with a consciousness of the frailty of human judgment—whether that testimony contained willful and material falsehoods, and, if so, assess in light of all the other knowledge gained about the defendant the meaning of that conduct with respect to his prospects for rehabilitation and restoration to a useful place in society. Awareness of such a process realistically cannot be deemed to affect the decision of an accused but unconvicted defendant to testify truthfully in his own behalf.

Grayson, 438 U.S. at 55. The guidelines supply precisely the "wooden or reflex" enhancement disclaimed by the Court. A defendant who stands trial has already probably passed up an opportunity, through a negotiated plea, for a lesser charge and sentence. At trial, he must choose between remaining silent, with a heavy risk of conviction, and testifying on pain of facing an enhanced sentence. At every turn, he is encouraged to forfeit his rights, and is subjected to

increased punishment for refusing to do so. When deciding to testify, he is not simply "aware" of a "process" that might take his untruthfulness into account, he is (and ought to be advised by his counsel) aware that the very fact of his testifying will be used against him if he is convicted.

We are not satisfied that there are enough safeguards in place to prevent this enhancement from unfairly coercing defendants, guilty or innocent, into remaining silent at trial. Other circuits have reviewed the district court's finding of untruthfulness under a "clearly erroneous" standard. *Batista-Polanco*, 927 F.2d at 22; *Matos*, 907 F.2d at 276; *Wallace*, 904 F.2d at 605; *Beaulieu*, 900 F.2d at 1540; *O'Meara*, 895 F.2d at 1220. Of course, in light of the jury's verdict of guilt, the district court's finding will never be "clearly erroneous" where the verdict is sustainable; if the verdict cannot be supported, the sentencing finding will of course be moot. Our review of these enhancements would therefore be an empty ritual.

We are similarly unimpressed with the guidelines' admonition to district courts to view the defendant's testimony "in a light most favorable to the defendant." Whatever light is held to it, a defendant's testimony that has been apparently rejected in material respects by a jury will almost always compel a finding of untruthfulness. If the district court does not so find, the "clearly erroneous" standard of review may actually be tested, but, of course, on the government's appeal.

D.

We who have been schooled and immersed in our system of law are perhaps too quick to make the jury an infallible icon and a witness' oath a sacred rite;

we ignore the human infirmities that flaw both. In short, our love of our system easily produces a chauvinistic faith in its perfection.

Nearly twenty years ago, in announcing this circuit's rule permitting, as *Grayson* later did, consideration of a defendant's perjury in setting an indeterminate sentence, Judge Butzner cautioned us to remember these frailties.

> [S]entencing judges should not indiscriminately treat as a perjurer every convicted defendant who has testified in his own defense. Witnesses induced by sordid motives or fear have been known to fabricate accusations with such guile that even conscientious triers of fact have been misled. Moreover, some essential elements of proof of criminal conduct, such as knowledge, intent, malice, and premeditation are sometimes so subjective that testimony about them cannot be readily categorized as true or false. Judges must constantly bear in mind that neither they nor jurors are infallible. A verdict of guilty means only that guilt has been proved beyond a reasonable doubt, not that the defendant has lied in maintaining his innocence.

United States v. Moore, 484 F.2d 1284, 1287-1288 (4th Cir. 1973).

The rigidity of the guidelines makes the § 3C1.1 enhancement for a disbelieved denial of guilt under oath an intolerable burden upon the defendant's right to testify in his own behalf. Consequently, though we affirm Dunnigan's conviction, we remand for resentencing without the enhancement for obstruction of justice.

CONVICTION AFFIRMED; SENTENCE VACATED AND REMANDED

APPENDIX B

FILED November 15, 1991

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5668
CR-89-36

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SHARON DUNNIGAN, DEFENDANT-APPELLANT

CORRECTED ORDER

The appellee filed a petition for rehearing with suggestion for rehearing in banc. A member of the Court requested a poll on the suggestion for rehearing in banc. The poll failed by an evenly-divided vote. Judges Widener, Wilkinson, Wilkins, Niemeyer, Hamilton, and Luttig voted to rehear the case in banc, and Judges Ervin, Russell, Phillips, Murnaghan, Sprouse, and Hall voted against rehearing in banc.

The original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing and suggestion for rehearing in banc.

Entered at the direction of Judge Hall, with the concurrence of Judge Phillips and Judge Williams, U.S. District Judge sitting by designation. Judge

Wilkins reserves the right to file a dissenting opinion to the denial of the suggestion for rehearing in banc.

For the Court,

/s/ John M. Greacen
JOHN M. GREACEN
Clerk

WILKINS, Circuit Judge, dissenting:

The panel opinion holds that a sentencing enhancement for obstruction of justice based upon a defendant's perjury at trial, *see* United States Sentencing Commission, *Guidelines Manual*, § 3C1.1 (Nov. 1989), constitutes an intolerable burden on a defendant's right to testify.[1] *United States v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991). The panel reasons that the potential for an obstruction enhancement would impermissibly chill a defendant's right to testify and that section 3C1.1, as an automatic enhancement for which meaningful appellate review is unavailable, is antithetic to the sentencing enhancement for untruthfulness held permissible by the Supreme Court in *United States v. Grayson*, 438 U.S. 41 (1978). *Id.* All other circuits that have addressed this issue have upheld the constitutionality of section 3C1.1 "based on the premise that a defendant's right to testify in his own behalf is not a license to commit perjury." *Id.* at 183; *see, e.g.*, *United States v. Batista-Polanco*, 927 F.2d 14 (1st Cir. 1991); *United States v. Matos*, 907 F.2d 274 (2d Cir. 1990); *United States v. Acosta-Cazares*, 878 F.2d 945 (6th Cir.), *cert. denied*, 110 S. Ct. 255 (1989); *United States v. Fiala*, 929 F.2d 285 (7th Cir. 1991) (dicta); *United States v. Wagner*, 884 F.2d 1090 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1829 (1990); *United States v. Barbosa*, 906 F.2d

[1] *Dunnigan* does not prohibit application of the enhancement to a defendant who, for example, suborns the perjury of others or lies to judicial or law enforcement personnel. It is ironic that the panel forbids the application of the enhancement to a defendant who commits perjury, but would permit its application to a defendant who lies to a probation officer in an unsworn interview.

1366 (9th Cir.), *cert. denied*, 111 S. Ct. 394 (1990); *United States v. Keys*, 899 F.2d 983 (10th Cir.), *cert. denied*, 111 S. Ct. 160 (1990); *United States v. Wallace*, 904 F.2d 603 (11th Cir. 1990) (per curiam). Because I believe that the rationale of the panel is wrong, and because the panel opinion creates a split in the circuits,[2] I respectfully dissent.

I.

A.

In the pre-guidelines case *United States v. Grayson*, the Supreme Court addressed whether the district court erred in considering at sentencing that the defendant had testified falsely during his trial. 438 U.S. 41. Grayson argued that the sentencing enhancement violated his right to due process because it "constitute[d] punishment for the crime of perjury for which he ha[d] not been indicted, tried, or convicted." *Id.* at 52. Additionally, Grayson contended "that permitting consideration of perjury [in fashioning an appropriate sentence] will 'chill' defendants from exercising their right to testify on their own behalf." *Id.*

The Court rejected both arguments. *Id.* at 53-55. The Court concluded that a defendant's right to testify is "the right to testify truthfully in accordance with the oath," and stated:

[2] Not only does the panel adopt a position at odds with every circuit that has addressed this question, but it does so on a constitutional basis, thereby preventing the United States Sentencing Commission from using its authority, acknowledged in *Braxton v. United States*, to resolve the conflict. 111 S. Ct. 1854, 1857-58 (1991).

> Assuming, *arguendo*, that the sentencing judge's consideration of defendants' untruthfulness in testifying has any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible. There is no protected right to commit perjury.

Id. at 54. The Court also discussed the corollary argument that the consideration of perjury at sentencing will inhibit a defendant's right to testify truthfully. This argument, the Court found, was "entirely frivolous." *Id.* at 55. Thus, the Court directly repudiated the rationale, upon which the panel relies, that consideration of a defendant's false trial testimony in fashioning a sentence is an undue burden on a defendant's right to testify.

B.

The panel attempts to avoid the result mandated by *Grayson* by concluding that the justification underlying the *Grayson* decision is not present under guideline sentencing. Additionally, the panel endeavors to distinguish *Grayson* by maintaining that the section 3C1.1 enhancement is the type of automatic enhancement rejected by the Court in *Grayson*. These efforts cannot withstand scrutiny.

The panel reasons that the stated justification underlying the *Grayson* decision—that consideration of a defendant's untruthfulness may provide the sentencing court guidance as to a defendant's "need for rehabilitation and society's need for protection," *id.* at 53—is not present in the guidelines which "deem a denial of guilt on the stand 'obstruction of justice.'" *Dunnigan*, 944 F.2d at 184. This rational is incorrect. In promulgating the sentencing guidelines, the Sentencing Commission sought to "further the

basic purposes of criminal punishment, *i.e.*, deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender." U.S.S.G. Ch.1, Pt.A(2), intro. comment. Perjured testimony by a defendant is an equally appropriate consideration in sentencing under the philosophies of sentencing recognized in *Grayson* and the sentencing guidelines.

Next, the *Dunnigan* panel characterizes the obstruction guideline as supplying "precisely the 'wooden or reflex' enhancement disclaimed by the [*Grayson*] Court." *Dunnigan*, 944 F.2d at 184 (quoting *Grayson*, 438 U.S. at 55). The panel posits that a defendant knows that he is "less likely to be acquitted if he remains silent, despite his right to do so and even in the face of instructions to the jury to draw no adverse inference from his silence." *Id.* at 183. Additionally, the panel submits that a defendant who wishes to testify on his own behalf must weigh the potential consequences of remaining silent against the possibility that otherwise inadmissible evidence will be introduced to impeach his credibility if he chooses to testify. *Id.* The panel concludes that if an "automatic" enhancement for obstruction of justice is imposed when a defendant testifies and is nevertheless convicted, the burden would be too great and "the defendant may not think testifying worth the risk." *Id.* at 184.

This reasoning illustrates a misconception on the part of the panel as to the nature and proper application of section 3C1.1. The obstruction enhancement is not designed "to punish a defendant for the exercise of a constitutional right." U.S.S.G. § 3C1.1, comment. (n.3). Nor is it designed to apply automatically in the case of a defendant who tes-

tifies in his own defense but is nevertheless convicted.

Section 3C1.1 provides:

> If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1. This guideline is not to be applied indiscriminately to every defendant who testifies and is ultimately convicted. A defendant may testify to matters not directly related to factual guilt or innocence. For example, a defendant may present evidence attempting to establish excuse—self-defense, duress, mistake of law or fact—that even if true may not legally exculpate him or prevent a jury from finding him guilty. Only when a district court, viewing the testimony in the light most favorable to the defendant, determines that the testimony was false and constituted a willful obstruction of justice, should the district court impose the section 3C1.1 enhancement. U.S.S.G. § 3C1.1, 3C1.1, comment. (nn.1(c), 2).

The panel attempts to support its assertion that the enhancement is automatic by contending that effective redress at the appellate level for improper application of the guideline is unavailable. Whether a defendant's testimony at trial was untruthful is reviewed under a clearly erroneous standard. *See United States v. Batista-Polanco*, 927 F.2d 14, 22 (1st Cir. 1991); *United States v. Matos*, 907 F.2d 274, 276 (2d Cir. 1990); *United States v. O'Meara*, 895 F.2d 1216, 1220 (8th Cir.), *cert. denied*, 111 S. Ct. 353 (1990); *United States v. Wallace*, 904 F.2d 603, 605 (11th Cir. 1990). The panel writes:

> [I]n light of the jury's verdict of guilt, the district court's finding will never be "clearly erroneous" where the verdict is sustainable; if the verdict cannot be supported, the sentencing finding will of course be moot.

Dunnigan, 944 F.2d at 185.

This argument fails for two reasons. First, it assumes that appellate courts are disinclined to engage in a thorough review of the challenged factual determinations as mandated by law. *See* 18 U.S.C.A. § 3742(e) (West Supp. 1991). In practice, courts have uniformly rejected the mechanistic application of section 3C1.1 envisioned by the panel, evinced a willingness to undertake review of challenged factual determinations, and carefully considered the factual support for the findings of the district court, even when that result is ultimately upheld. *See, e.g., United States v. Lozoya-Morales*, 931 F.2d 1216 (7th Cir. 1991) (vacating a section 3C1.1 enhancement when the district court applied it without making an independent finding of untruthfulness, and instead relied solely upon the jury's guilty verdict after the defendant had testified); *United States v. Martinez*, 922 F.2d 914 (1st Cir. 1991) (rejecting argument by Government that an enhancement for role in the offense based on the possession of a key mandated an enhancement for obstruction because it necessarily followed that the defendant was lying when he denied ownership of the key at trial); *see also United States v. Rehal*, 940 F.2d 1 (1st Cir. 1991) (enhancement proper when conclusion of the district court that defendant had testified untruthfully and had advised potential witnesses to change their stories or to refuse to cooperate with law en-

forcement personnel was not clearly erroneous); *United States v. Barry*, 938 F.2d 1327 (D.C. Cir. 1991) (vacating section 3C1.1 enhancement that the district court had applied on the basis of perjured testimony); *United States v. Jackson*, 935 F.2d 832 (7th Cir. 1991) (vacating an obstruction enhancement when the evidence indicated solely that the defendant did not tell everything he knew about a codefendant's criminal activity); *United States v. Bonds*, 933 F.2d 152 (2d Cir. 1991) (per curiam) (basing a section 3C1.1 enhancement on the fact that defendant had changed his appearance after being served with a subpoena was improper, but basing it on a deliberate falsehood under oath was proper);[3] *United States v. Urbanek*, 930 F.2d 1512 (10th Cir. 1991) (reversing an obstruction of justice enhancement when the defendant made false statements, but none of the false statements could be shown to have impeded the investigation); *United States v. Hamilton*, 929 F.2d 1126 (6th Cir. 1991) (enhancement for obstruction was proper when the evidence indicated that defendant had perjured himself repeatedly during his sentencing hearing); *United States v. Hassan*, 927 F.2d 303 (7th Cir. 1991) (enhancement proper when the evidence indicated that defendant had lied repeatedly at detention and sentencing hearings). To date, not a single appellate court has affirmatively supported the type of automatic, mechanistic enhancement over which the panel expresses its concern.

[3] In *Bonds*, the Second Circuit specifically noted that upholding the enhancement on the basis of perjured testimony "should not be interpreted as authorizing sentencing judges to impose obstruction of justice upgrades whenever a defendant has testified on his own behalf." 933 F.2d at 155.

Second, defendants who challenge factual determinations underlying section 3C1.1 have no greater burden than those challenging other factual findings. The position advanced by the panel is equally applicable to all factual determinations made by a sentencing court, findings that are subject to the clearly erroneous standard on review. While this burden may be difficult to meet, this fact does not render the finding constitutionally suspect. If this were a valid reason to prohibit the consideration of information that may adversely impact a defendant's sentence, all factual findings made by the sentencing court would be equally suspect. In the context of Chapter 3 of the guidelines, the victim-related adjustments in Part A and the adjustments for role in the offense in Part B, as well as the obstruction enhancement in Part C would be prohibited. *See* U.S.S.G. Ch.3, Pts.A-C. Each of these adjustments requires that the district court make factual findings by a preponderance of the evidence that are subject to a clearly erroneous standard on review. A defendant who seeks to challenge the application of any of these adjustments has the same avenue of redress and must meet the same burden. The enhancement for obstruction of justice should not be singled out in this respect.[4]

In summary, the panel cannot distinguish the use of perjured testimony to enhance a defendant's sentence under section 3C1.1 from the use approved in *Grayson*. The general policies underlying the use of the information in pre-guideline practice were not changed by guideline practice. Section 3C1.1 was not

[4] When a case is appealed not by a defendant to protest an enhancement, but by the government to protest the failure by the court to apply one, the government must meet this same burden. Under these circumstances, the clearly erroneous standard of review operates to a defendant's benefit.

intended to be, nor has it been applied, as an automatic enhancement for all defendants who take the stand in their own defense but who are nevertheless convicted. The Supreme Court, in *Grayson*, rejected the argument that consideration of perjured testimony in determining an appropriate sentence would impermissibly chill a defendant's right to testify. The *Grayson* rational is not distinguishable and should control.

II.

Having dismissed controlling Supreme Court authority, the panel seeks to justify its conclusion that the potential for a section 3C1.1 enhancement will impermissibly chill a defendant's right to testify. The panel concludes, as noted above, that because a defendant must already weigh the potential consequences of one impermissible inference (guilt based on silence) against another (prior bad acts make it more likely that he committed this act), the addition of an "automatic" enhancement for obstruction of justice for a defendant who chooses to testify but is convicted would be too great a burden and would lead defendants to waive their right to testify. *Dunnigan*, 944 F.2d at 184-85. Aside from the faulty reasoning of the panel with respect to the issue of whether the enhancement is automatic, the argument that the application of section 3C1.1 would chill a defendant's exercise of this protected right is purely speculative.

Prior to the adoption of the sentencing guidelines, it was within the discretion of the sentencing court to enhance a defendant's sentence based upon a finding that the defendant had testified untruthfully at trial. Indeed, under pre-guideline practice the sentencing court could conclude that the sentence should

be increased because of the defendant's perjured testimony, increase the sentence by such amount the court deemed appropriate, and then announce the sentence without providing any explanation or justification for it. Even before the *Grayson* decision, the majority of the courts of appeals addressing the question, including this court, had held that a defendant's untruthfulness at trial could be considered by the sentencing court in fashioning an appropriate sentence. *See, e.g., United States v. Moore*, 484 F.2d 1284 (4th Cir. 1973); *United States v. Hendrix*, 505 F.2d 1233 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975); *United States v. Nunn*, 525 F.2d 958 (5th Cir. 1976); *United States v. Wallace*, 418 F.2d 876 (6th Cir. 1969), *cert. denied*, 397 U.S. 955 (1970); *United States v. Levine*, 372 F.2d 70 (7th Cir.), *cert. denied*, 388 U.S. 916 (1967); *Hess v. United States*, 496 F.2d 936 (8th Cir. 1974); *United States v. Cluchette*, 465 F.2d 749 (9th Cir. 1972); *Humes v. United States*, 186 F.2d 875 (10th Cir. 1951); *but see Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969) (rejecting argument that perjury was probative of appropriate sentence). The obstruction guideline has not altered past practice in this respect. *See Barbosa*, 906 F.2d at 1369; *United States v. Beaulieu*, 900 F.2d 1537, 1539 (10th Cir.), *cert. denied*, 110 S. Ct. 3252 (1990).

Because under pre-guideline practice the only limitation on the ability of a district court to use a defendant's perjured testimony to enhance his sentence was the statutory maximum penalty, it is illogical to assume that under guidelines practice a defendant may be chilled from exercising his right to testify because he faces the possibility of a two-level enhancement. On the contrary, it is equally plausible that a defendant, who previously confronted the possibility

of a virtually unlimited increase in his sentence if he took the stand on his own behalf but was ultimately convicted, would now be *more* likely to exercise his right when the down-side risk he faces has been quantified and limited. For this reason, the contention that the possibility of a section 3C1.1 enhancement will chill a defendant's exercise of his right to testify is speculative at best.

III.

The panel opinion improperly disregards Supreme Court precedent, exhibits fallacious reasoning, and creates a gratuitous split among the circuit courts of appeals. Therefore, I respectfully dissent from the order denying en banc consideration.

Judge Wilkinson, Judge Niemeyer, and Judge Luttig join in this dissenting opinion.

APPENDIX C

FILED: August 30, 1991

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5668

D/CT#: CR-89-36

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SHARON DUNNIGAN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of West Virginia
at Charleston

JUDGMENT

This case was heard by the Court on the record from the District Court and was argued by counsel.

The Court affirms the conviction, vacates the sentence and remands the case to the District Court, at Charleston, for resentencing proceedings consistent with this Court's opinion.

/s/ John M. Greacen
Clerk

APPENDIX D

FILED

November 20, 1991

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5668

CR-89-36

US

v.

DUNNIGAN

MANDATE

The judgment of this Court dated 8/30/91 takes effect today.

JOHN M. GREACEN
Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45281